No. 92-1266

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

E. J. LEIZERMAN

Petitioner,

v.

TOLEDO BAR ASSOCIATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Michael E. Tankersley
(Counsel of Record)
Alan B. Morrison
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Mark H. Aultman
Charles W. Kettlewell
150 E. Wilson Bridge Road
Suite 200
Worthington, Ohio 43085
(614) 436-2750

Counsel for Petitioner

March 19, 1993

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In its Opposition, Respondent repeatedly emphasizes that the absolute prohibition against lawyers guaranteeing loans to indigent clients for living expenses that are needed to withstand delays in litigating their personal injury claims is the longstanding rule of *Ohio*, and has been adopted by most other *states*. *See* Respondent's Opposition ("Resp. Opp.") at 3, 9, 12. Petitioner does not dispute these observations, but they only underscore the need for review by this Court. While DR 5-103(B) forbids loan guarantees such as those involved here as a matter of the law of Ohio, that prohibition is in direct conflict with *federal law*. The federal district court in Ohio has ruled that such a prohibition improperly interferes with the ability of claimants under the Federal Employers' Liability

Act, 45 U.S.C. §§ 51-60 ("FELA"), to vindicate their federal rights. *In re Ruffalo*, 249 F. Supp. 432, 445 (N.D. Ohio 1965). Moreover, the federal court rejected Ohio's ban on lawyer assistance for medical and living expenses because it recognized that such a bar interferes with the claimants' rights of access to the courts when it is applied, as here, to prohibit assistance to personal injury victims who may otherwise be forced to abandon or accept inadequate settlement of their claims because of litigation delays. *Id.* at 441-44.

Respondent does not dispute the significance of these issues. Instead, it attempts to dismiss the conflict between state and federal law at issue in the first question presented, and to contest the merits of the second. These arguments miss the mark and, as we show below, only highlight the need for review.

I.

A. As the Petition shows, this case presents important constitutional issues concerning the authority of states to discipline attorneys representing claimants under a federal statute in federal court for conduct that the federal courts have explicitly approved because it fosters the vindication of federal rights. *See* Petition at 11, 16-19. Respondent's rejoinder -- namely that there is no conflict between federal and state law -- is simply erroneous. In the Federal District Court for the Northern District of Ohio the governing law is the decision in *In re Ruffalo*, which explicitly held that federal law rejects as unjust the very prohibition on assistance to indigent clients that the state enforced against Petitioner in the proceedings below. 249 F. Supp. at 442-45. This decision has not been displaced by any contrary federal decision, rule, or statute, and the federal court in Ohio still permits lawyers to assist FELA claimants who need help with living or medical expenses to withstand delays in litigation. *See* Petitioner's Appendix ("Pet. App.") at A26.

Respondent's "no conflict" claim is based on its mistaken contention that the *Ruffalo* decision was

"superseded in 1970 when Ohio adopted DR 5-103(B)." Resp. Opp. at 3, 6. This assertion ignores the settled doctrine that state codes of professional conduct do *not* control the standards of professional conduct in federal courts. *In re Snyder*, 472 U.S. 634, 645 n.6 (1985); *In re Ruffalo*, 390 U.S. 544, 547 (1968). Thus, the state's codification of its prohibition on such assistance cannot "supersede" a prior federal court decision declaring the federal law on professional conduct. Moreover, it is well-established that federal law preempts state practice rules that have the effect of defeating federal rights under the FELA. *See* Petition at 16.

The same misconception underlies Respondent's argument that the 1991 Order by the Federal District Court for the Northern District of Ohio approving petitioner's motion for permission to guarantee a loan for living expenses to an FELA claimant "adds nothing" because the motion and the Order did not cite DR 5-103(B) of the Ohio Code. Resp. Opp. at 6. There was no need to cite the state rule because the applicable law in the federal court is that of the federal district court, not the contrary state rule.[1] Indeed, the proceedings concerning this client (who was not among the clients whose loans were the basis for the disciplinary proceeding) vividly demonstrate the predicament that the decision below creates for members of the Ohio bar, like petitioner, who represent FELA claimants in federal court. Because the state disciplinary proceedings at issue here were pending, as a precautionary measure petitioner did not provide assistance after the federal court order was entered in May 1991, but instead filed a motion for leave from the Supreme Court of Ohio to advance expenses to this FELA claimant as authorized in the federal order. Hearing Tr. at 119-121. The Ohio Supreme Court, as Respondent acknowledges, denied the motion, despite the

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[1] Moreover, the Magistrate who granted the motion was a member of the Ohio bar and was presumably aware of the state's contrary rule. Hearing Tr. at 55, 135-36.

contrary ruling by the federal court. Resp. Opp. at 4 n.1 and A4. As a result, although the federal court with jurisdiction over the FELA claim had authorized assistance (*see* Pet. App. at A26), no assistance was provided because Petitioner was also subject to a contrary order from the Ohio Supreme Court refusing to approve that very same assistance (*see* Resp. Opp. at A4).[2]

Thus, there could not be a more direct conflict between the state and federal law. Review by this court is essential to avoid the threat to the federal authority created by Ohio's use of its disciplinary authority to punish attorneys practicing in federal courts for actions authorized by the federal court. *See* Petition at 18-19 (citing cases holding that application of state disciplinary rules to practice in federal court is preempted). In addition, this Court should grant review, as it has in past cases, to ensure that the federal rights protected by the FELA are not defeated by rules of local practice. *Cf. Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949).

B. Respondent's alternative argument for not granting review on the first issue -- that there is an independent and adequate state ground for the discipline -- is also erroneous, as demonstrated by the findings made by the Board of Commissioners and adopted by the Ohio Supreme Court. In the proceedings below, the parties stipulated that Petitioner did not procure funds for the three non-FELA clients, but assisted in the procurement

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[2] Respondent's charge that the federal court's Order should be ignored because the motion upon which it was based gave the "misleading impression" that "'the trend nationally is for the court . . . to authorize advances or loans for living expenses,'" Resp. Opp. at 3, is frivolous. The record below includes ample, uncontested evidence that there is a trend in some federal courts and a few states to authorize such loans for the very reasons identified in the *Ruffalo* decision. *See, e.g.,* Hearing Tr. at 229-32; Pet. App. at A17-18; *see also id.* at A27-A29 (Minnesota and District of Columbia rules explicitly authorizing such loans).

of loans *only* for the nine FELA clients. Pet. App. at A2, A8-A9. Petitioner co-signed three non-FELA notes previously procured by the other attorney charged in the disciplinary proceedings, his former associate, Mr. McGill, in order to protect the integrity of loans for FELA clients. Pet. App. at A2. But Petitioner's conduct "did not directly result in the advancing of any money to those [non-FELA] clients." *Id.* at A2, A11; *see* Petition at 5 & n.1. Thus, the co-signing of the non-FELA notes did not "advance or guarantee financial assistance" to the non-FELA clients in violation of DR 5-103(B), and did not provide the basis for the state's disciplinary action. In imposing discipline, the Ohio Supreme Court held that DR 5-103(B) prohibited both Petitioner's conduct in aiding FELA claimants and Mr. McGill's conduct in procuring funds for non-FELA client -- completely ignoring the fact that Petitioner's actions were governed by, and permitted under, federal law.

II.

Respondent asserts that the second question presented is not worthy of review by arguing that the prohibition on assistance for medical or living expenses needed to withstand litigation delays (i) does not interfere with any constitutionally protected rights; and (ii) is rationally related to legitimate state interests. The findings below, however, contradict Respondent's argument and demonstrate why this case is an ideal vehicle for this Court to address the First Amendment, Due Process, and Equal Protection issues raised by the blanket prohibition of all lawyer assistance to indigent clients for medical and living expenses.

First, Respondent claims that there is no interference with constitutionally protected rights because clients who need assistance to avoid being forced to settle their claims prematurely can obtain it from third parties. Resp. Opp. at 8. But this argument is belied by the uncontested facts. The loans at issue here were, in fact, made by a third party, a commercial bank. Pet. App. at A11. The

attorney's guarantee, however, was necessary to provide security for the bank loan and, without the guarantee, the FELA claimants would have been unable to withstand the court delays and obtain a hearing on their claim. Pet. App. at A11-12.

Second, Respondent's recitation of the legitimate state interests that have been cited in other contexts as the justification for DR 5-103(B), Resp. Opp. at 10, is unavailing because the findings below show that *none* of these interests is served by the application of the rule to the conduct at issue here. The Board and the Ohio Supreme Court acknowledged in their findings that there was no interference with the attorney's independent professional judgment, and that the guarantees were not used to solicit clients. Pet. App. at A3. Nor could concern that "the only witnesses to the circumstances of the loan would be the parties thereto," Resp. Opp. at 11, justify prohibiting these loans, especially in light of the Board's explicit finding that the loans "were facilitated openly from a recognized financial institution." Pet. App. at A3.

In addition, as noted in the Petition, all of the asserted state interests are equally applicable to contingency fee arrangements, and to advances for litigation costs and expenses, that are permitted under the state professional codes of Ohio and other states. Petition at 8, 27-28. The fact that the state permits these arrangements, but arbitrary prohibits attorneys from assisting indigent clients who need medical or living expenses to continue to pursue their claims demonstrates that the rule is not based on rational distinctions or narrowly tailored to serve its purpose, as is required for it to withstand constitutional scrutiny. *Id.* at 23-24, 28-29.

Thus, as in past cases in where this Court has held that disciplinary actions impermissibly infringe on constitutional rights, the decision below involves the application of a categorical disciplinary rule in a manner that does not rationally serve the state interests that supposedly justify the rule. *See, e.g. Zauderer v. Office of*

Disciplinary Counsel, 471 U.S. 626, 644-45 (1985); *NAACP v. Button,* 371 U.S. 415, 444 (1963). Indeed, the only effect of applying DR 5-103(B) to prohibit the loan guarantees at issue in this proceeding is to deny needy clients who have valid FELA claims the assistance with medical and living expenses they need to avoid being forced to accept an unjust settlement. Thus, this case squarely presents substantial constitutional issues of widespread significance that warrant review by this Court.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

Michael E. Tankersley
(Counsel of Record)
David C. Vladeck
Alan B. Morrison
Public Citizen
Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Mark H. Aultman
Charles W. Kettlewell
150 East Wilson Bridge Rd.
Suite 200
Worthington, Ohio 43085
(614) 436-2750

Counsel for Petitioner

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